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OCT 18 1999

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

October 18, 1999

Magalie Roman Salas, Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

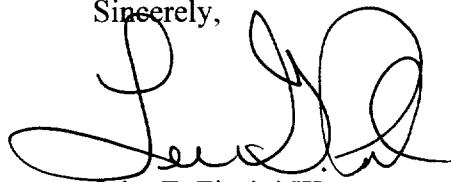
**Re: Comments of Rock On Radio, L.L.C. to Joint Counterproposal
MM Docket No. 98-74; RM-9269; RM-9736
Eatonville, Wenatchee and Moses Lake, Washington**

Dear Ms. Salas:

Transmitted herewith, on behalf of Rock On Radio, L.L.C., is an original and four (4) copies of its Comments on Counterproposal in the above-referenced proceeding.

Should there be any questions, please contact undersigned counsel.

Sincerely,



John E. Fiorini III
Lee G. Petro

Enclosures

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**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In re:

Amendment of Section 73.202(b),
Table of Allotments, FM Broadcast
Stations (Eatonville, Wenatchee and
Moses Lake, Washington)

MM Docket No. 98-74
RM-9269
RM-9736

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OCT 18 1999

**FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY**

**TO: CHIEF, ALLOCATIONS BRANCH
POLICY AND RULES DIVISION
MASS MEDIA BUREAU**

COMMENTS ON COUNTERPROPOSAL

Pursuant to Section 1.402 of the Commission's rules, 47 C.F.R. § 1.402 (1998), Rock On Radio, L.L.C. ("Rock On"), the licensee of Station KKBY(FM), Eatonville, Washington,¹ hereby submits its Comments regarding the Joint Counterproposal submitted by Pioneer Broadcasting Company, Inc. ("Pioneer"), Upper Columbia Media Association ("UCMA"), and James and Helen Stargel ("Stargel") (collectively the "Joint Petitioners") on July 13, 1998. The Commission released a Public Notice on October 1, 1999 (Rpt. No. 2363), specifying the Joint Counterproposal as a counterproposal in the Notice of Proposed Rulemaking in MM Docket 98-

¹ The FCC consented to the assignment of license of Station KKBY(FM), Eatonville, Washington from Ms. Barbara J. Geesman to Rock on Radio, L.L.C. on August 5, 1999 (BALH 990617HX). On September 14, 1999, Rock On notified the Commission that the transaction was consummated. As the successor-in-interest to Barbara J. Geesman, Rock On has standing to file the instant Comments.

74, and permitted reply comments to be submitted within 15 days.² Pursuant to Section 1.4 of the Commission's rules, 47 C.F.R. § 1.4 (1998), these Reply Comments are timely filed.

As discussed more fully below, the Joint Counterproposal must be denied. Although the Joint Counterproposal seeks to upgrade the operating facilities of three radio stations, neither the Petition nor the Joint Counterproposal claims to provide additional service to otherwise underserved areas. Consequently, the crucial difference between the KKBY upgrade and the Joint Counterproposal is that the KKBY upgrade will provide service to almost 65,000 more persons than the Joint Counterproposal. In light of this overwhelmingly superior engineering proposal, the Joint Counterproposal must be denied, and Rock On Radio's Petition granted.

I. BACKGROUND

On April 3, 1998, Barbara J. Geesman filed the underlying "Petition for Rulemaking and Orders to Show Cause" (Petition), whereby she proposed the following amendments to the Table of FM Allotments:

<u>Community</u>	<u>Present Allotment</u>	<u>Proposed Allotment</u>
Eatonville, Washington	285A	285C3
Wenatchee, Washington	271C, 285C2	271C, 262C2
Moses Lake, Washington	257A, 262C1	257A, 285C1

The proposal fully complied with the Commission's rules and policies, and Ms. Geesman confirmed that she would pay the reasonable expenses for the channel changes of the two other facilities.

² Although the Public Notice specified that the Commission received the Joint Petition on July 13, 1999, the Commission's records indicate that the Joint Petition was actually filed on July 13, 1998.

The Commission released a “Notice of Proposed Rulemaking and Order to Show Cause” on May 22, 1998 (DA-98-957), directing Pioneer to demonstrate why the licenses of Stations KKRV(FM) (285C2) and KWIQ-FM (262C1) should not be modified to reflect new operating channels. In response, Pioneer, UCMA, and Stargell filed its Joint Counterproposal, proposing:

<u>Community</u>	<u>Present Allotment</u>	<u>Proposed Allotment</u>
Moses Lake, Washington	257A, 262C1	257A, 262C
Newport, Washington	285A	285C3
Spokane, Washington	225C, 229C, 245C3, 251C, 255C, 260C, 280C2, 284A , 289C, 300C	225C, 229C, 245C3, 251C, 255C, 260C, 280C2, 285C2 , 289C, 300C

The result of this counterproposal is that Pioneer would upgrade its Class C1 facility (KWIQ-FM) to a Class C facility, Stargel would upgrade its Class A facility (KMJY(FM)) to a Class C3 facility, and UCMA would upgrade its Class A facility (KEEH(FM)) to a Class C2 facility.³ The Joint Petitioners claim that the Joint Counterproposal would better serve the public interest, as it would eliminate existing short-spacing between the stations, and between the stations and other allotments. In addition, the Joint Petitioners request the Commission to order Ms. Geesman to place funds in escrow to reimburse them for the channel changes in the event that the Commission does not grant their counterproposal. On October 1, 1999, the Commission released a Public Notice requesting comment on the Joint Counterproposal.

³ Jeffrey Aaron Bruton also filed a Counterproposal on July 13, 1998, requesting allotment of Channel 285 to Warden, Washington, but that Counterproposal has not been released on public notice. It should be noted that Ms. Geesman in her Reply Comments demonstrated that Channel 263C3 could be allotted to Warden, Washington, rather than Channel 285, thus eliminating the conflict between the two proposals. *Reply Comments of Barbara J. Geesman*, July 28, 1999.

II. ARGUMENT

A. Comparison of Proposals

The Petition is clearly superior to the Joint Counterproposal and, thus, should be preferred. The Commission has established the following four criteria to compare two proposals for amending the FM Table of Allotments:

- (1) first full-time aural service;
- (2) second full-time aural service;
- (3) first local service; and
- (4) other public interest matters.

Revision of FM Assignments, Policies and Procedures, 90 FCC 2d 88 (1982). In those cases where the two (or more) proposals do not involve the first three criteria, the Commission will grant the proposal that “will bring the benefits of a new primary service to the larger population.” *Greenup, Kentucky, and Athens, Ohio*, 2 FCC Rcd 4319, ¶11 (1987). Indeed, the Commission has a long history of favoring those proposals that would expand service to the greatest population.⁴

As discussed in the Engineering Statement attached hereto as Exhibit A, the Petition will provide an additional service 263,712 persons. *Engineering Statement*, pg. 2. On the other hand, the Joint Counterproposal collectively will provide an additional service to only 198,803 persons. *Id.* pg. 4. Therefore, the Petition will provide an additional service to almost 65,000 more persons than the Joint Counterproposal. On this basis alone, the Petition must be preferred. In

⁴ See Okmulgee, Nowata, Pawhuska, Bartlesville, Bixby, Oklahoma, Rogers, Arkansas, 10 FCC Rcd 12, 014 (1995) (winning proposal reached 102,605 more persons), Ashland, California, Rolla and Monore City, Missouri, 8 FCC Rcd 1799 (1993) (winning proposal reached 8,562 more persons), Bowling Green and Elizabethtown, Kentucky and Ferdinand, Indiana, 8 FCC Rcd 2097 (1993) (winning proposal reached 4,481 more persons), Rocky Mount, North Carolina, 8 FCC Rcd 6206 (1993) (winning proposal reached 24,347 more persons), Spring Grove and Preston, Minnesota, and Mason City, Iowa, 4 FCC Rcd 5738 (1989) (winning proposal reached 1,395 more persons).

addition, the Petition will eliminate the shortspacing between Station KKR-V-FM, Wenatchee, Washington and CFSR-FM, Abbotsford, British Columbia, Canada.

It is interesting to note that the Joint Petitioners failed to include a gain/loss study in their Joint Counterproposal, as *Greenup* and its progeny require when comparing two Criteria 4 proposals. *Greenup*, 2 FCC Rcd at ¶ 12 (“[i]n future cases we would expect the respective parties to prepare gain area comparisons studies to support their proposals”). As noted in the Engineering Statement, the Joint Counterproposal would remove service of KWIQ-FM, Moses Lake, Washington from 7,242 persons. Not only would the Joint Counterproposal provide additional service to nearly 65,000 fewer persons than as proposed in the Petition, but it would also eliminate the *only* aural service for 264 persons, the *second* aural service for 45 persons, the third aural service for 31 persons, and the fourth aural service for 97 persons. Clearly, the loss of service to these persons, combined with the considerable additional service provided by the Petition, override any secondary importance of eliminating the short-spacings disclosed in the Joint Counterproposal. *Joint Counterproposal*, at pg. 4.

Furthermore, any weight that the Joint Petitioners place on the fact that three stations would be upgraded, rather than just one, is clearly misplaced. The Joint Petitioners cite *Archilla-Marcocci Spanish Radio Company*, 101 FCC 2d 522 (1985) to support their proposition that on all occasions, upgrading three services is better than one. *Joint Counterproposal*, pg. 4. However, in *Archilla-Marocci*, the Commission focused primarily on the fact that the three small, distinct communities would be receiving their first aural service, and that the three communities played a “greater relative importance to the surrounding areas.” *Archilla-Maroccia*, 101 FCC 2d at ¶ 12. Most important, though, is the fact that in *Archilla-Maroccia*, the Commission was considering making the first aural allotments to three communities. Clearly,

there are different Section 307(b) considerations when considering the allocation of new facilities, rather than just the upgrade of existing stations.

Therefore, the Joint Counterproposal must be denied. The Petition will offer a new primary service to substantially more persons than under the Joint Counterproposal. Further, the Petition will not eliminate service to any persons, whereas the Joint Counterproposal will eliminate service to more than 7,242 persons, 448 of whom will receive less than five other services, and 309 of whom will receive no service (white area) or only one service (gray area). The grant of the Petition will follow the Commission's precedent of granting those proposals which provide the greatest increase in service.

B. Compensation for Resulting Channel Change

In the Joint Counterproposal, the Joint Petitioners make the extraordinary request that the Commission mandate the creation of an escrow account to which Petitioner would make a deposit of \$283,443.00 to cover the projected reimbursable expenses. In doing so, the Joint Petitioners state that [t]his is a large sum of money for the small size of the market involved," and that they seek assurances that Petitioner would make payment.

In *Circleville, Ohio*, 8 FCC 2d 159 (1967) the Commission established the requirement that the proponent of a third-party channel change reimburse the affected parties for their reasonable and prudent expenses in effectuating the necessary modifications. In subsequent cases, the Commission articulated that it "expects the parties involved to determine expeditiously, mutually and in good faith what are reasonably and prudently incurred reimbursable expenditures." *Peter Wayne Lechman*, 8 FCC Rcd 3058, ¶ 2 (1993). Only after the parties have failed to reach a mutually-agreeable solution will the Commission involve itself

with resolving the dispute. *Id.* See also *Hampton, Pella, Cedar Rapids, and Charles City, Iowa*, 39 FCC Rcd 452, ¶ 8 (1973).

In the instant matter, the Commission has not yet granted the Petitioner's proposal, let alone have the parties failed to reach a mutually-agreeable settlement. At the very least, the Joint Petitioners must be required to supply *bona fide* estimates before the Commission, or the Petitioner, should review their request.

Further, now that Ms. Geesman is no longer part of the proceeding, it is expected that the Joint Petitioners would remove this irregular request. There is no question of Rock On's capacity to make whatever reimbursement is deemed appropriate. In the pursuit of a quick resolution of this matter, though, the Petitioner proposes the following as an agreeable reimbursement schedule:

Expenses	KKRV(FM)	KWIQ(FM)
Downtime	\$ 5,600	\$ 5,600
Loss of Market Share	\$ 5,600	\$ 5,600
Collateral Expenses	\$ 3,800	\$ 3,800
Promotion	\$ 5,600	\$ 4,050
Re-Marketing	\$10,800	\$10,800
Antenna	\$16,000	\$35,000
On Site tuning	\$ 0	\$ 0
Shipping	\$ 1,000	\$ 1,000
Instalation	\$ 2,000	\$ 2,500
Modification	\$ 1,500	\$ 2,000
Labor for Mod	\$ 0	\$ 0
TOTAL	\$51,900	\$70,350
Proposed Compensation: \$122,250.00		

It would be expected that the Petitioner and Pioneer Broadcasting Company would be able to reach a mutually-agreeable resolution to this matter once the Commission has granted the

Petitioner's proposal. Until that time, the Joint Petitioner's request should receive no further consideration.


III. CONCLUSION

Therefore, the Joint Counterproposal must be dismissed. As proposed, the Joint Counterproposal will serve almost 65,000 person less than would the Petition. Just as significant, though, is the fact that the Joint Counterproposal will create "white" and "grey" areas. The fact that three stations would be upgraded, in comparison to the upgrade of one station proposed in the Petition, does not offset these deficiencies.

For the foregoing reasons, Rock On Radio, L.L.C. respectfully requests that the Commission reject the Joint Counterproposal and expeditiously grant the Petition.

Respectfully submitted,

ROCK ON RADIO, L.L.C.

By: 
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Its Attorneys

October 18, 1999

TECHNICAL STATEMENT
CONCERNING FM COUNTER-PROPOSAL
FILED IN MM DOCKET NO. 98-74

This Technical Statement has been prepared in support of comments from station KKBY-FM on channel 285A (104.9 MHz) at Eatonville, Washington. It concerns a joint counter-proposal filed in the Federal Communications Commission (FCC) Notice of Proposed Rule Making (NPRM) in MM Docket No. 98-74.

The rule making (RM) docket was initiated by station KKBY-FM. Station KKBY-FM proposes to upgrade its allotment on channel 285 from Class A to Class C3. Station KKBY-FM specified an allotment reference point for channel 285C3 with coordinates of 46-50-19, 122-11-53. The Class C3 allotment reference point is about 4.5 kilometers (2.8 miles) east of the current site.

To accomplish the upgrade station KKBY-FM proposes to change the frequency of station KKRK(FM) at Wenatchee, Washington from channel 285C2 (104.9 MHz) to channel 262C2 (100.3 MHz). Station KKBY-FM also proposes to change the frequency of station KWIQ-FM at Moses Lake, Washington from channel 262C1 (100.3 MHz) to channel 285C1 (104.9 MHz). The new channels for stations KKRK and KWIQ-FM would be equivalent in class with no need to change transmitter site.

Pioneer Broadcasting, Upper Columbia Media and James & Helen Stargel filed a joint counter-proposal. The counter-

proposal requests an upgrade for station KWIQ-FM on channel 262 (100.3 MHz) at Moses Lake, Washington from Class C1 to Class C.

The proposed channel 262C allotment reference point is on High Hill (47-29-20, 119-26-45), approximately 41.9 kilometers (26 miles) north-northwest of the Moses Lake city reference point.

The joint counter-proposal also proposes changing the frequency and class of station KMJY-FM at Newport, Washington from channel 285A (104.9 MHz) to channel 283C3 (104.5 MHz). The joint counter-proposal includes a request to change the frequency and class of station KEEH(FM) at Spokane, Washington from channel 284A (104.7 MHz) to channel 285C2 (104.9 MHz).

Based on the above, the KKBY-FM upgrade proposal at Eatonville can be compared to joint counter-proposal involving stations KWIQ-FM, KMJY-FM and KEEH(FM). The frequency changes proposed by KKBY-FM for stations KKRK and KWIQ-FM would not involve a difference in coverage (i.e., no service loss or gain)

Figure 2 is a map showing the 1 mV/m circles for the present KKBY-FM allotment on channel 285A (28.3 km) and the proposed allotment on channel 285C3 (39.1 km). The following is an estimate of the population (1990 Census) and land area within the assumed contours. As shown, the assumed 1 mV/m contour for the proposed channel 285C3 allotment completely encompasses the assumed 1 mV/m contour for the present channel 285A allotment (i.e., no loss area).

<u>KKBY-FM Allotment</u>	<u>Population</u>	<u>Land Area</u>
Present Channel 285A	46,901	2,516 sq km
Proposed Channel 285C3	310,613	4,803
Proposed Gain (no loss)	263,712	2,287

Figure 3 shows the assumed 1 mV/m circles for the KWIQ-FM present channel 262C1 (72.3 km) and proposed channel 262C (91.8 km) allotments. It is noted that there will be gain and loss areas for this allotment change.

<u>KWIQ-FM Allotment</u>	<u>Population</u>	<u>Land Area</u>
Present Channel 262C1	74,331	16,422 sq km
Proposed Channel 262C	156,370	26,475
Common	67,089	13,323
Present Loss	7,242	3,099
Proposed Gain	89,281	13,152
Proposed Net Gain	82,039	10,053

Figure 4 shows the assumed 1 mV/m circles for the KMJY-FM present channel 285A (28.3 km) and proposed 283C3 (39.1 km) allotments. There will be no loss area for this allotment proposal.

<u>KMJY-FM Allotment</u>	<u>Population</u>	<u>Land Area</u>
Present Channel 285A	17,077	2,516 sq km
Proposed Channel 283C3	37,479	4,803
Proposed Gain (no loss)	20,402	2,287

Figure 5 shows the assumed 1 mV/m circles for the KEEH present channel 284A (28.3 km) and proposed channel 285C2 (52.2 km) allotments. There will be no loss area for this allotment proposal.

<u>KEEH Allotment</u>	<u>Population</u>	<u>Land Area</u>
Present Channel 284A	340,017	2,516 sq km
Proposed Channel 285C2	436,379	8,560
Proposed Gain (no loss)	96,362	6,044

The KKBV-FM allotment proposal results in a 1 mV/m gain to 263,712 people within 2,287 square kilometers. The joint counter-proposal results in a net 1 mV/m gain to 198,803 people within 18,384 square kilometers. The KKBV-FM allotment proposal has a greater population gain and results in no loss area.

Figure 6 is a map showing the proposed KWIQ-FM loss area (area within 1 mV/m circle for present channel 262C1 allotment but outside 1 mV/m circle proposed channel 262C allotment). The FCC's AM and FM databases have been used to determine the other radio services available to the proposed KWIQ-FM loss area. For AM stations the night interference free limit has been determined and the extent of the groundwave contour has been calculated using soil conductivities from FCC Figure M3. For FM stations the predicted 1 mV/m circle based on maximum facilities for the class has been used, except for Class C stations and educational FM stations where present facilities were used to determine the 1 mV/m circle.

The following is a list of the radio stations whose contour is identified by letter on Figure 6.

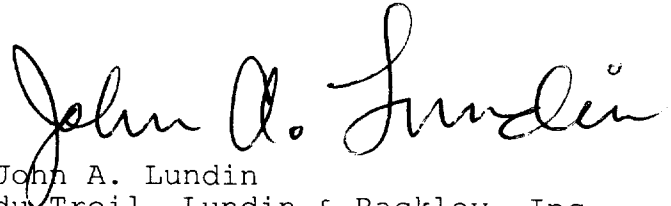
<u>Letter</u>	<u>Station</u>	<u>Channel</u>
A	KISC, Spokane, WA	251C
B	KNLT, Walla Walla, WA	239C
C	KIOK, Richland, WA	235C
D	KZZU-FM, Spokane, WA	225C
E	KFFM, Yakima, WA	297C
F	KRSE, Yakima, WA	289C1
G	KRCW, Royal City, WA	242C2
H	KXDD, Yakima, WA	281C1
I	KATS, Yakima, WA	233C1
J	KDNA, Yakima, WA	*220C1
K	KFAE-FM, Richland, WA	*206C
L	KEGX, Richland, WA	293C
M	KAEP, Spokane, WA	289C
N	KONA-FM, Kennewick, WA	287C
O	KORD, Richland, WA	274C
P	KZLM-FM, Othello, WA	248C3

The numbers shown in the proposed KWIQ-FM loss area on Figure 6 indicate the number of other radio services available to the area. The following is a breakdown by population and area.

<u>Number of Other Services</u>	<u>Population</u>	<u>Land Area</u>
0	264	670 sq km
1	45	147
2	31	112
3	97	74
4	11	39
5 or more	6,794	2,057
Total	7,242	3,099

As shown, the joint counter-proposal allotment for KWIQ-FM will result in a predicted loss of 1 mV/m coverage to underserved areas.

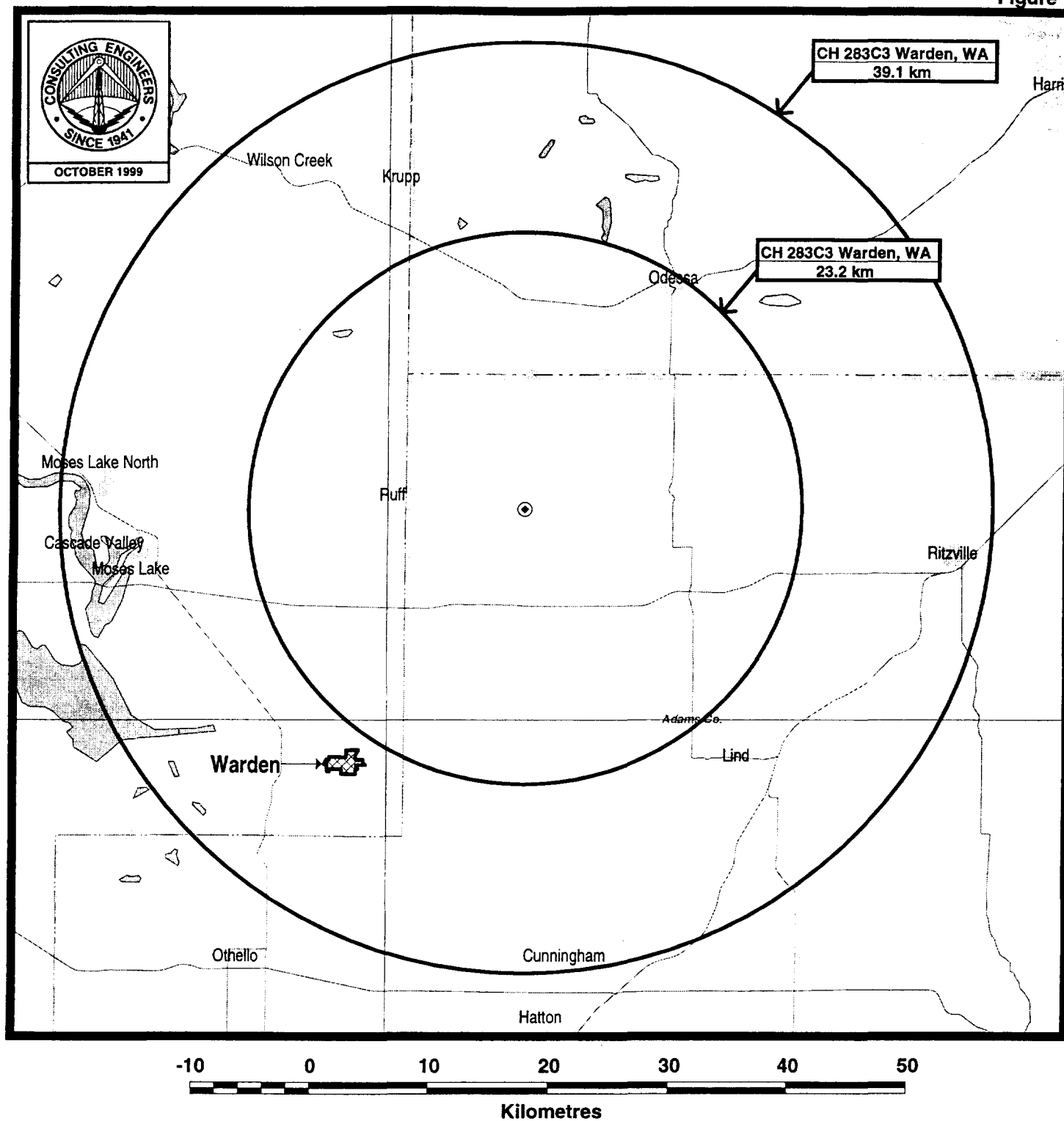
If there are questions concerning this technical statement, please contact the office of the undersigned.

A handwritten signature in black ink, reading "John A. Lundin". The signature is written in a cursive style with a large, prominent "J" and "L".

John A. Lundin
du Treil, Lundin & Rackley, Inc.
201 Fletcher Avenue
Sarasota, Florida 34237
(941) 329-6000

October 15, 1999

Figure 1



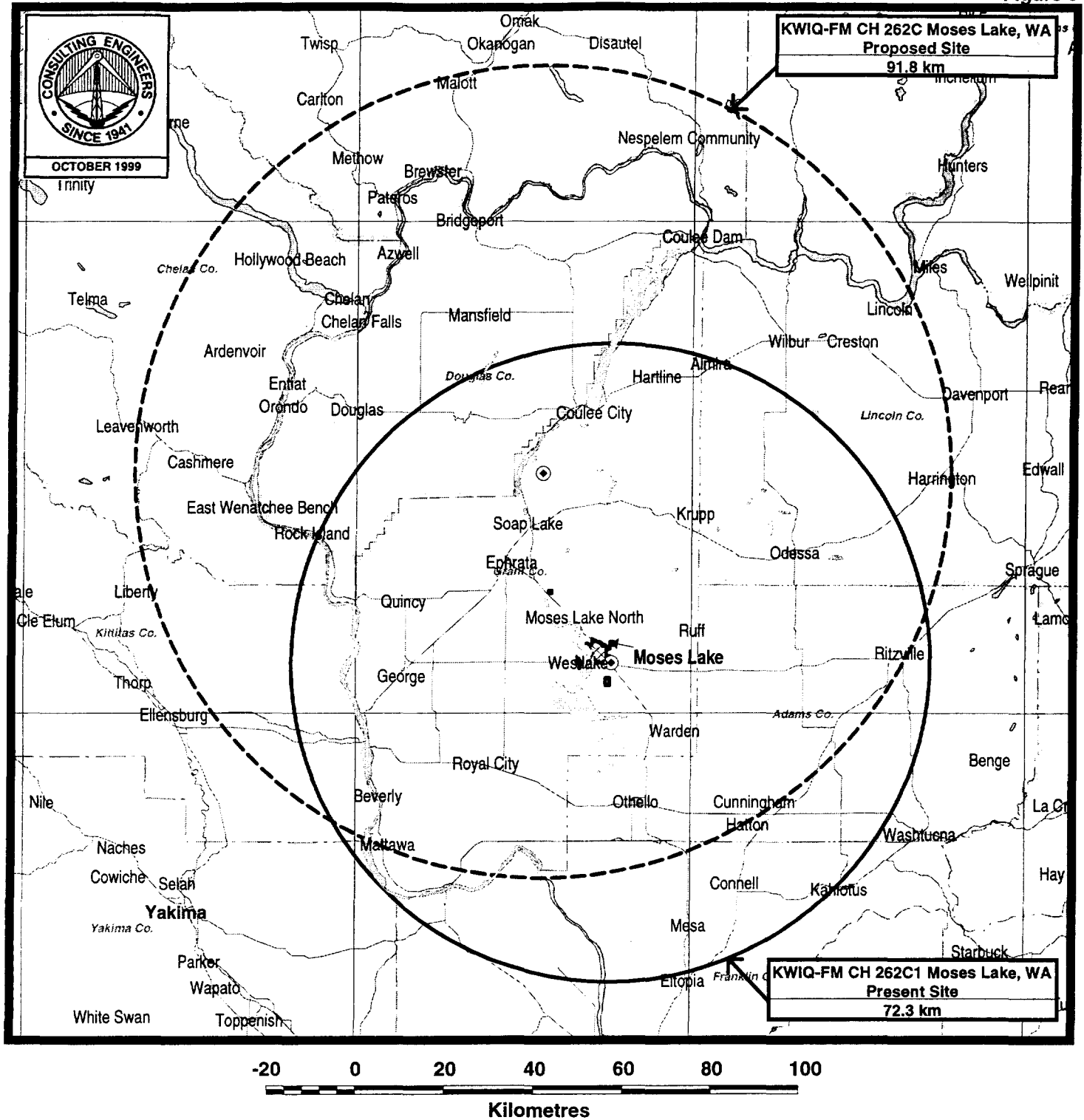
CONTOUR

CHANNEL 283C3
WARDEN, WASHINGTON

Scale: 1:465,300

du Treil, Lundin & Rackley, Inc. Sarasota, Florida

Figure 3



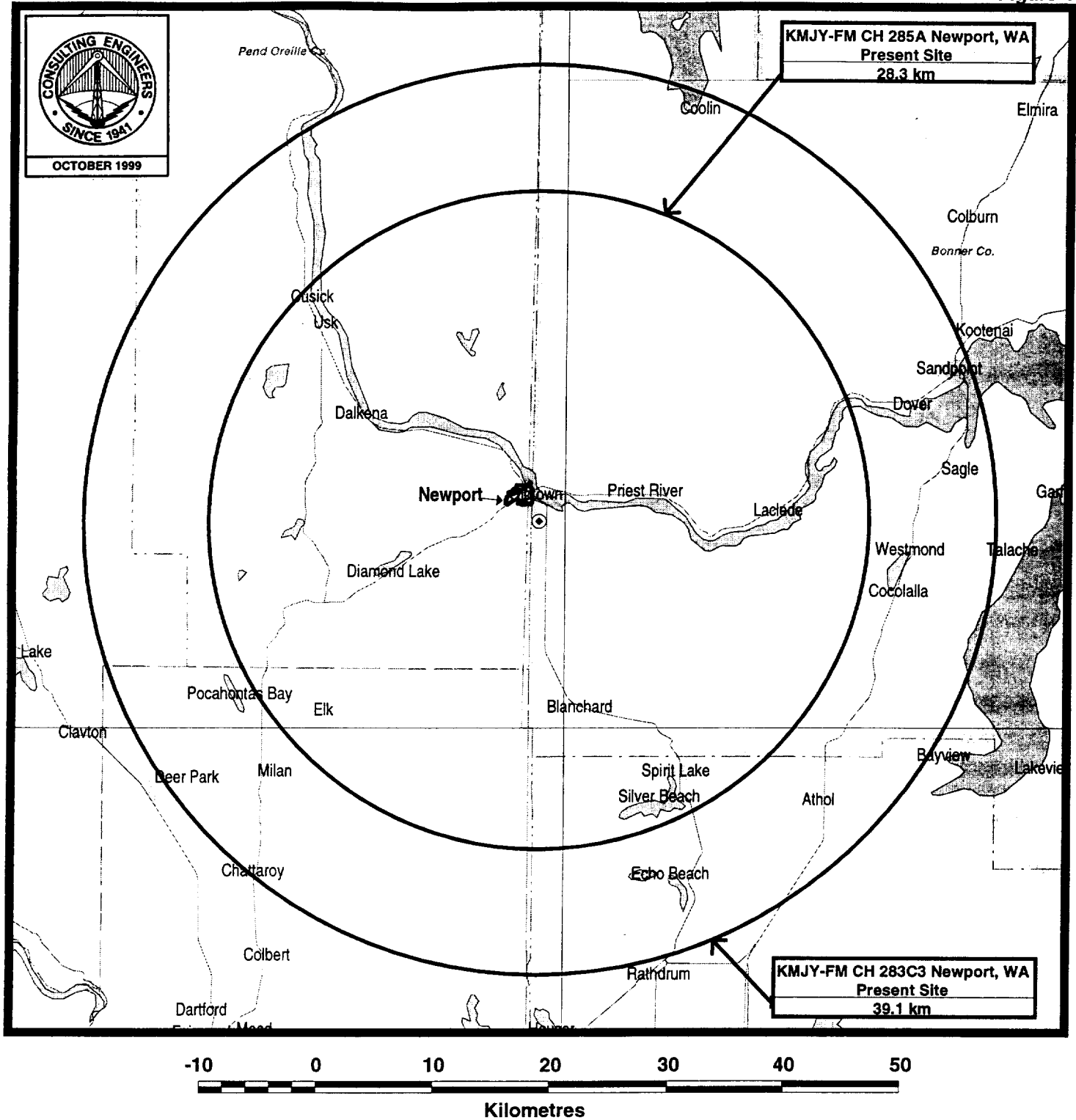
CONTOURS

KWIQ-FM
MOSES LAKE, WASHINGTON

du Treil, Lundin & Rackley, Inc. Sarasota, Florida

Scale: 1:1,260,000

Figure 4



CONTOURS

KMJY-FM
NEWPORT, WASHINGTON

Scale: 1:475,900

du Treil, Lundin & Rackley, Inc. Sarasota, Florida

Figure 5

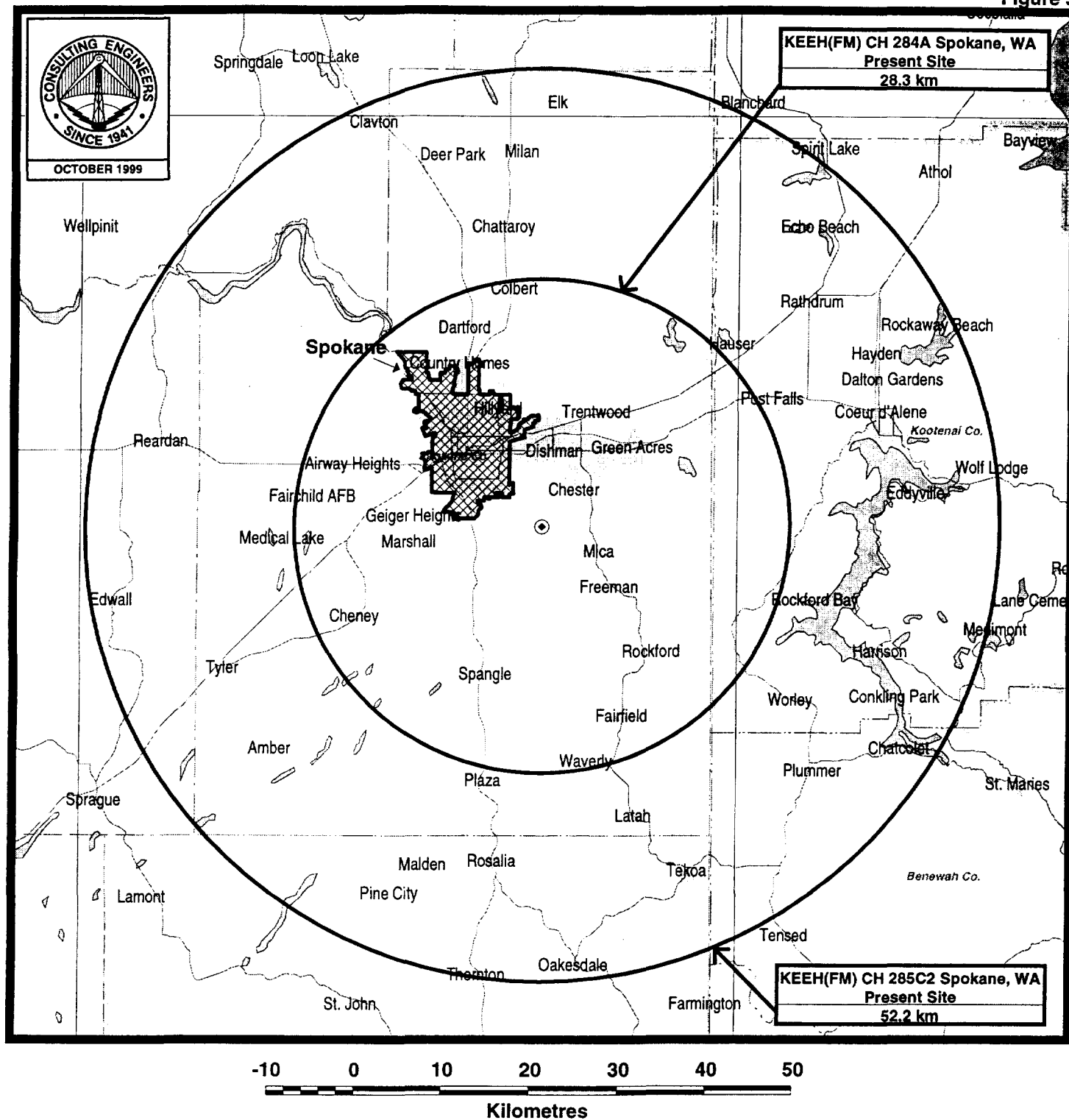
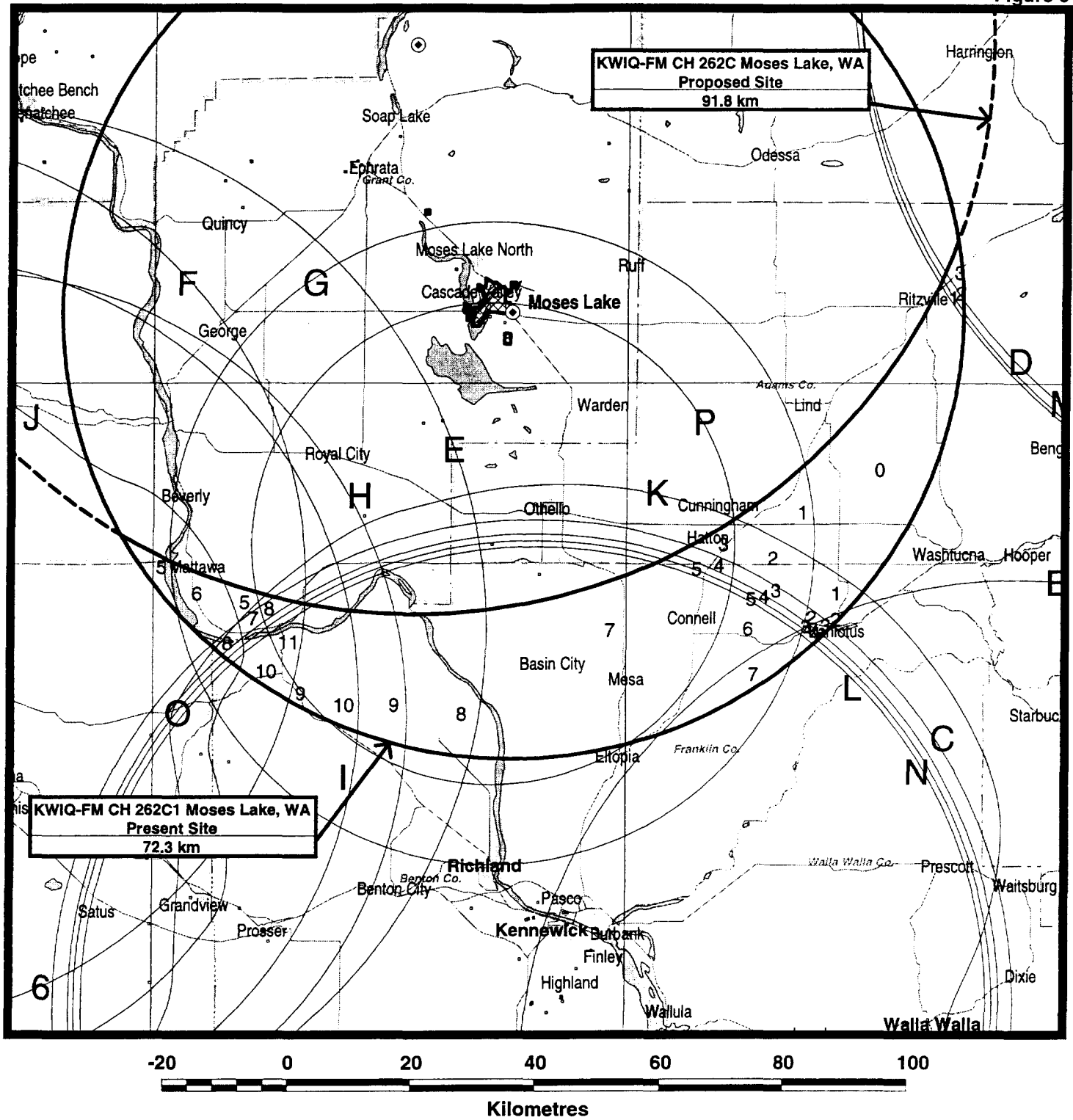


Figure 6



CONTOURS

KWIQ-FM
MOSES LAKE, WASHINGTON

Scale: 1:895,500

du Treil, Lundin & Rackley, Inc. Sarasota, Florida

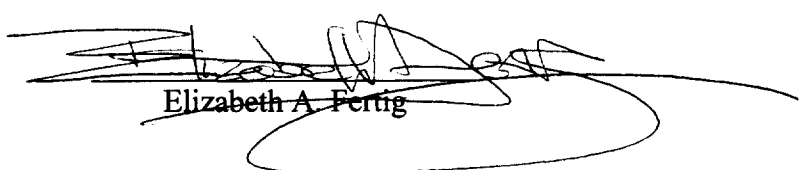
CERTIFICATE OF SERVICE

I, Elizabeth A. Fertig, a secretary in the law firm of Gardner, Carton & Douglas, certify that I have this 18th day of October, 1999, caused to be sent by first-class U.S. mail, postage-prepaid, a copy of the foregoing Comments on Counterproposal of Rock On Radio, L.L.C., to the following:

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